80-447

Supreme Court, U.S.
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SEP 17 1980
MICHAEL RODAK, JR., CLERK

NO. _____

SUPREME COURT OF THE UNITES STATES

OCTOBER TERM, 1980

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CARL ERIC OLSEN,

Petitioner,

vs.

STATE OF IOWA,

Respondent

---

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

---

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## QUESTION PRESENTED FOR REVIEW

Whether the station house search of Petitioner's automobile which uncovered marijuana was unlawful because it was conducted pursuant to a warrant which failed to describe with particularity the place to be searched and the items to be seized.

Whether, given the invalidity of the warrant, the search of Petitioner's automobile, which was stopped upon a public highway and thereafter removed to a police station, was nevertheless reasonable under the so-called automobile exception to the Fourth Amendment's warrant requirement despite the absence of exigent circumstances.

## PARTIES

1. Petitioner, Carl Eric Olsen, through his Attorney, Raymond Rosenberg, of Rosenberg & Margulies, 1010 Insurance Exchange Building, Des Moines, Iowa, 50309, Telephone (515) 243-7600.

2. Respondent, State of Iowa, through Thomas J. Miller, Attorney General of the State of Iowa, Hoover State Office Building, Des Moines, Iowa 50319, Telephone (515) 281-5164 and Stephen J. Petersen, Muscatine Iowa County Attorney, 415 Iowa Avenue, Muscatine, Iowa 52761, Telephone (515) 263-6262.

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## OPINION BELOW

The opinion of the Iowa Supreme Court in this action was filed on June 18, 1980, and the official citation is State v. Olsen, 293 N.W.2d 216 (Iowa 1980).

## JURISDICTIONAL STATEMENT

The judgment of the Iowa Supreme Court in this action was filed on June 18, 1980, and is a final judgment rendered by the highest Court in the State of Iowa. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTES

Forth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment, United States Constitution:

> . . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

Supplement to the Iowa Code (1977), § 204.401(1):

> . . . . [I]t is unlawful for any person to . . . . possess with intent to . . . . deliver, a controlled substance . . . .
>
> Any person who violates this subsection with respect to:
>
> . . . . (b) Any other controlled substance classified in Schedules I . . . . is guilty of a class "D" felony.

Iowa Code (1977), § 204.204:

> (1) The controlled substances listed in this Section are included in Schedule I.
>
> (4)(j) Marijuana

Supplement to the Iowa Code (1977, § 902.9:

> The maximum sentence for any person convicted of a felony shall be that prescribed by statute or, if not prescribed by statute . . . . shall be determined as follows:

> (4) A Class "D" felony . . . . shall be confined for no more than five years, and in addition may be sentenced to a fine of not more than One Thousand Dollars.

Supplement to Iowa Code (1977), § 907.3:

> Pursuant to § 901.5 (statute confering judicial power to impose traditional criminal sanctions), the court may, upon, . . . . a verdict of guilty, . . . . exercise any of the options contained in subsections 1 and 2 of this section (statute authorized deferred judgments and probation). However, this section shall not apply to . . . . a violation of § 204.401, Subsection 1 . . . .

## STATEMENT OF THE CASE

On the 19th day of June, 1978, a Trial Information was filed in Muscatine County, Iowa, charging that the Petitioner, Carl Eric Olsen, on the 21st day of May, 1978, possessed in Muscatine County, Iowa, a controlled substance (marijuana) with intent to deliver in violation of § 204.401(1) of the 1977 Code of Iowa.

The questions presented for review herein were first raised by a pretrial motion to suppress, filed in the Muscatine Iowa District Court on February 5, 1979. (App. p. 4) and an amendment thereto, filed on March 9, 1979 (App. p. 11). After an evidentiary hearing the District Court overruled the motion in its entirety. (App. p. 14)

After Petitioner was adjudged guilty of the crime of possession of marijuana with intent to deliver, a timely notice of appeal to the Iowa Supreme Court was filed and that Court affirmed the District Court's ruling on the merits. (App. p.

## STATEMENT OF FACTS

While driving his 1977 Dodge automobile near West Liberty, Iowa, at approximately 10:45 p.m. on May 20, 1978, Petitioner passed two other vehicles in a no-passing zone. The incident was observed by Deputy Sheriff Lowell Snyder, who pursued Petitioner and stopped his automobile in West Liberty. Two West Liberty police

officers came to the scene of the stop shortly afterward. Snyder was somewhat suspicious of Petitioner because he was driving a car with out-of-county plates, seemed to be unfamiliar with the road, and appeared to be in a hurry. As a result, he ordered a vehicle check which confirmed Petitioner's ownership of the automobile. While issuing him a citation for the traffic violation, Snyder smelled marijuana on Petitioner's clothing. He and the other officers also smelled a strong marijuana odor coming from the interior of the vehicle. One officer observed and removed a marijuana cigarette, which he called "a large roach," from the front ashtray. A small cardboard box, containing marijuana seed, was removed from the front seat. The officers, who were experienced in drug investigations, believed the odor of marijuana was stronger than could be accounted for by

the cigarette. They noticed the rear of the vehicle appeared to be weighted down.

Petitioner was placed under arrest for possession of marijuana. A search of his clothing turned up a small "rock-hard" quantity of hashish in a shirt pocket and twelve to fourteen dollars in quarters in his trouser pockets. He admitted to a prior arrest for possession of marijuana. The officers searched the interior of the vehicle without finding any additional drugs. They then asked Petitioner for permission to search the trunk. He became quite nervous and refused, telling the officers he had people waiting for him and he was in a hurry. He asked them to leave his vehicle alone.

The officers suspected Petitioner might be carrying additional marijuana in the trunk of the car. For that reason they decided to take the vehicle to the West Liberty police station to be held while they sought a search warrant.

The vehicle was towed to the station and guarded until a warrant was obtained.

Deputy Snyder obtained and executed the search warrant. He found 129 pounds of marijuana in the trunk of the vehicle, most of which was contained in bales wrapped in brown paper. Another officer discovered a white paper bag behind the spare tire which contained $10,915 in currency. Additional marijuana was found in a briefcase, and other items were also seized.

The warrant does not describe the personal property except as a vehicle "owned, controlled or in the possession of Carl Eric Olsen". No further description of the vehicle is given and all blanks in the form warrant for the insertion of description are unused and remain blank. (App. p. 1)

There is no identification or description of the property sought to be seized except in the language of the form

warrant as follows:

> (property which has been used as a means of committing or accomplishing the commission of a felony).

All blank lines and spaced provided in the form for the insertion of particulars or description remain blank and are unused.

The search warrant is entirely devoid of any descriptive particulars that were meant to be inserted in the blank lines to describe the place to be searched and the property to be seized.

At the time the search warrant was issued, an "Application for Search Warrant" signed by Snyder, was presented to the Magistrate. The Application for the Search Warrant does contain a description of the vehicle as follows:

> A 1977 Dodge 2 door listed on the vehicle registration as Red in color, bearing Iowa license plates number 3 AKJ671 with a validation sticker bearing the number (78) 3 010620. The

vehicle identification number is DH23T7D117223.

However, the affidavit was not in the possession of the deputies at the time of the search, nor was it physically connected to the warrant. Also, the search warrant did not refer to the affidavit or adopt its contents by reference.

## ARGUMENT

The two issues presented for review on this Petition for a Writ of Certiorari are: 1) Whether the search which uncovered the marijuana was unlawful because it was conducted pursuant to a warrant which failed to describe with particularity the place to be searched and the items to be seized, and 2) Whether, given the invalidity of the warrant, the search was nevertheless reasonable under the so-called automobile exception to the warrant requirement of the Fourth Amendment to the United States Constitution.

THE SEARCH WARRANT

The body of the search warrant contains no description of the vehicle to be searched or the property to be searched for. The blank lines contained in the printed form, which were intended to be filled in with the description of the vehicle or premises to be searched and the property sought to be seized, remain blank. (App. p. 1-2)

The Search Warrant is insufficient on its face because it does not describe with particularity the place to be searched or the property to be seized. (App. p. 1-2)

The plain language of the Fourth Amendment to the Constitution of the United States requires that ". . . . no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particulary describing the place to to be searched and a person or things to be seized." (Emphasis furnished.)

The reasons for this constitutional requirement generally is related to the intent of the Constitutional makers to prohibit general searches.

Professor Wayne R. LaFave, in his book entitled Search and Seizure, A Treatise on the Fourth Amendment (1978), states the reason for the rule requiring a particular description of the place to be searched somewhat differently in Volume 2 at page 72:

> One of the specific commands of the Fourth Amendment is that no warrants shall issue except those "particularly describing the place to be searched." Quite obviously, the primary purpose of this limitation is to minimize the risk that officers executing search warrants will by mistake search a place other than the place intended by the magistrate. In addition, however, the requirement of particularity is related to the probable cause requirement, in that - at least under some circumstances - the lack of a more specific description will make it apparent that there has not been a sufficient showing to the magistrate that the described items are to be found in a particular place.

Unless the warrant particularly described the property to be seized, it violates the Constitutional prohibition against general searches. Marron v. U.S., 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927).

The search warrant issued in the case at bar contains no description of the thing sought to be seized. The only language in the search warrant relating to the property, does not identify the property but states only general grounds why any property is seizable.

> (Property which has been used as a means of committing or accomplishing the commission of a felony.)

The application for the search warrant does contain an adequate description of the vehicle and facts sufficient to establish probable cause, however, there is a fundamental distinction between the warrant and the underlying

affidavit, and the affidavit is not necessarily either part of the warrant or available for defining the scope of the warrant. Moore v. U.S., 461 F.2d 1236, 1238 (D.C. Cir. 1972); United States v. Kaye, 139 U.S. App. D.C. 214, 432 F.2d 647 (1970); Ledbetter v. United States, 93 U.S. App. D.C. 155, 211 F.2d 628, cert. denied, 347 U.S. 977, 74 S.Ct. 789, 98 L.Ed. 1116 (1954).

In Bloom v. State of Florida, 283 So.2d 134, 136 (Fla. 1973) the court citing Moore v. U.S., 461 F.2d 1236, with approval, stated:

> There is a fundamental distinction between a search warrant and the underlying or supporting affidavit, and the affidavit is not necessarily either part of the warrant nor available for defining the scope of the warrant. Moore v. United States, 149 U.S. App. D.C. 150, 461 F.2d 1236 (1972). Therefore, even if the affidavit which supported the warrant was sufficiently detailed, it would not cure the defect in the search warrant consisting of a failure to describe items to be seized with

> particularity, since specificity is required in the search warrant so that the discretion of the officer executing the search warrant is limited. State v. Muldowney, 60 N.J. 594, 292 A. 2d 26 (1972); see also Marron v. United States, supra.

Bloom v. State of Florida, 283 So.2d 134 appears to be identically on point with the case at bar. In Bloom the Search Warrant did not particularly describe the property to be seized, but the affidavits on which the issuance of the search warrants was based did describe the property to be seized.

The Court in Bloom held that a Search Warrant which does not particularly describe the property to be seized was invalid on its face for failure to limit the discretion of the officer executing the warrant. Bloom v. State of Florida, 283 So. 2d 134, 135-136.

The Court in Bloom v. State of Florida then faced the same issue as that presented

in the case at bar, to-wit:

> We note from the record on appeal the affidavits on which the issuance of the search warrants was based described the property to be seized. Thus the question becomes whether search warrants, invalid on their face, may be validated by the presence of properly drawn supporting affidavits.
>
> [2,3] There is a fundamental distinction between a search warrant and the underlying or supporting affidavit, and the affidavit is not necessarily either part of the warrant nor available for defining the scope of the warrant. Moore v. United States, 149 U.S.App.D.C. 150, 461 F.2d 1236 (1972). Therefore, even if the affidavit which supported the warrant was sufficiently detailed, it would not cure the defect in the search warrant consisting of a failure to describe items to be seized with particularity, since specificity is required in the search warrant so that the discretion of the officer executing the search warrant is limited. State v. Muldowney, 60 N.J. 594, 292 A.2d 26 (1972); see also Marron v. United States, supra.
>
> [4] Some decisions, however, have permitted an affidavit to cure a defective search warrant where the affidavit and the search warrant are such that they can be reasonably said to constitute one document. Two requirements must be satisfied to

> reach this result: first, the affidavit and the search warrant must be physically connected so that they constitute one document; and second, the search warrant must expressly refer to the affidavit and incorporate it by reference using suitable words of reference. Moore v. United States, supra, aff'd United States v. Moore, 263 A.2d 652 (D.C.App.1970); United States v. Ortiz, 311 F.Supp.880 (D.C.Colo. 1970), aff'd 445 F.2d 1100, cert. denied 404 U.S. 993, 92 S.Ct. 541, 30 L.Ed.2d 545.
>
> In the case sub judice the above requirements have not been satisfied; the affidavits therefore do not cure the fatal defect in the search warrant consisting of a failure to particularly describe the property to be seized. Therefore, it was error for the trial court not to have suppressed the evidence seized as a result of the search warrant. Florida Const., art. 1, § 12, F.S.A.

The search warrant issued by the Magistrate in the case at bar did not accompany the Warrant nor was it attached to the Warrant and there is no "suitable words of reference" which incorporate the affidavit by reference. Therefore, the warrant was fatally defective.

AUTOMOBILE EXCEPTION

If the warrant in the case at bar is invalid, the search may nevertheless be found reasonable under an exception to the Fourth Amendment's warrant requirement. The only exception possibly applicable here is the automobile exception of Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925) and Chambers v. Maroney, 399 U.S.42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970).

The application of the automobile exception to justify the search under the facts of this case dramatically demonstrates the deviations from fundamental Fourth Amendment consideration by the Chambers decision. In this case, the obtaining of an invalid warrant belies and negatives any rational claim of exigent circumstances. It is clear that the application of Chambers to this case simply ignores the Fourth Amendments express preference for a search warrant.

This deviation was elaborately pointed out in Chambers by Mr. Justice Harlan in his partial dissent. Further, if this relaxation of the warrant requirement is thought to be justified by the diminished expectation of privacy associated with automobiles, (see Payton v. New York, ___ U.S. , 100 S.Ct. 1371, ___ L.Ed.2d ___ (1980), where the converse seems to have been recognized), then this Court's decision in Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979) and United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) may well have eroded an important underlying premise of Chambers.

The questions presented for review here are simply: 1) Whether Chambers has abrogated the Fourth Amendment's warrant preference in regard to automobiles, and 2) Whether the diminished expectations of privacy associated with

automobiles extends to all portions of the automobile under all circumstances.

Because of the obvious lack of exigent circumstances in this case and the fact that Petitioner's trunk was searched, this case presents issues not fully addressed in Chambers and clouded by Sanders and Chadwick. Factually, this case draws into controversy those aspects of Chambers that have been troublesome to both members of this Court and other courts across the country.

Respectfully submitted,

Raymond Rosenberg
ROSENBERG & MARGULIES
1010 Insurance
Exchange Building
Des Moines, Iowa 50309
(515) 243-7600

## CERTIFICATE OF SERVICE

It is hereby certified by the undersigned that true and accurate copies of the foregoing legal document were delivered by depositing a copy of the same in the United States Mail and addressed to Thomas J. Miller, Attorney General of the State of Iowa, Hoover State Office Building, Des Moines, Iowa, 50319 and Stephen J. Petersen, Muscatine County Attorney, 415 Iowa Avenue, Muscatine, Iowa 52761.

Paul H. Rosenberg

App. 1

SEARCH WARRANT

IN THE ASSOCIATE COURT OF THE IOWA DISTRICT COURT OF MUSCATINE COUNTY, IOWA

| | | |
|---|---|---|
| THE STATE OF IOWA, Plaintiff | : | BEFORE: |
| vs. | : | Edmund D. Barry Magistrate ~~Judge~~ of |
| CARL ERIC OLSEN AND CERTAIN PERSONAL PROPERTY, | : | Said Court |
| Defendants. | : | 28208-878 |

THE STATE OF IOWA, MUSCATINE COUNTY, ss
TO ANY PEACE OFFICER OF MUSCATINE COUNTY, STATE OF IOWA:

WRITTEN INFORMATION, on oath, having been made by a credible resident of the State of Iowa, before me, Edmund B. Barry Magistrate ~~Judge~~ of said Court, and filed therein, charging that certain personal property is in said County within or about certain (~~premises~~) (vehicle) as follows: _____ _____ which (~~premises~~) (vehicle) iw owned, controlled or in the possession of Carl Eric Olsen and/or said personal property is in said County on or about the person of which personal property is described as follows: _____

and which personal property is property for which a search warrant may issue for the reason that it is (~~stolen property~~) (~~embezzled property~~) (property which has been used as a means of committing or accomplishing the commission of a felony).

That the undersigned magistrate is satisfied from his examination of the applicant, and of other witnesses, if any, and of the information, of the existence of the grounds of the application and that there is probable cause to believe their existence and that a SEARCH WARRANT should issue; AND NOW THEREFORE YOU ARE COMMANDED TO MAKE IMMEDIATE SEARCH of the above named (~~premises~~) (vehicle) (~~person~~) _____ and if said property or any part thereof be found, you are to SEIZE the same with the vessels containing same and to keep the same securely until final action be had thereon, and you will forthwith serve this writ and return

same to this Court, with your return endorsed thereon in accordance with law.

Given under my hand and seal of said Court this 21st day of May, 1978.

/s/ Edmund D. Barry,
Magistrate

STATE OF IOWA, MUSCATINE COUNTY, ss.

I, Lowell L. Snyder, Deputy Sheriff, Muscatine County Sheriff's Dept., Muscatine, Iowa hereby certify and return that the within search warrant came into my hands for service on the 21st day of May, A.D., 1978, and I executed same on the 21st day of May, A.D., 1978, by making search of the (vehicle) therein described and found on vehicle therein described, the following personal property, to-wit: $10,915 in cash (See attached with denomination and serial numbers of all bills) 10 pieces of various containers containing leafy material substance believed to be Marijuana. (See attached list containing weights of each package and total weight) One (1) brown samsonite

briefcase containing two (2) packages of leafy material substance believed to be marijuana; two (2) small notebooks containing coded material and names of subjects.

which said personal property with the vessels containing same I then and there seized by virtue of the within search warrant and which I now hold subject to the further order of the Court.

/s/ Lowell L. Snyder

STATE OF IOWA, MUSCATINE COUNTY, ss.

I, Lowell L. Snyder, being duly sworn do on oath say that the above return is true and correct.

Subscribed and sworn to before me this 28th day of August, A.D., 1978.

MOTION TO SUPPRESS
(Filed February 5, 1979)

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

| | | |
|---|---|---|
| STATE OF IOWA, | : | NO. 738-578 |
| Plaintiff, | : | |
| vs. | : | |
| CARL ERIC OLSEN, | : | MOTION TO SUPPRESS (Evidentiary Hearing Requested) |
| Defendant. | : | |

The Defendant, Carl Eric Olsen, by his attorneys, Raymond Rosenberg and Gregory Johnston, hereby moves the Court, pursuant to Rule 11 of the Iowa Rules of Criminal Procedure for an Order suppressing as evidence, all property seized on May 21, 1978 by police officers of the City of Muscatine, Iowa, and West Liberty, Iowa, and/or officers of the Sheriff's office of Muscatine, Iowa, on May 21, 1978, from the Defendant's motor vehicle and from the Defendant, to-wit:

(A) $10,915.00 in United States currency;

(B) 10 pieces of various containers, containing leafy material;

(C) 1 Brown Samsonite Brief Case, containing 2 packages of leafy material;

(D) 2 Small notebooks containing

written material, as a result of the execution of a search warrant, dated the 21st day of May, 1978, which said warrant directed police officers to search a vehicle owned, controlled or in the possession of Carl Eric Olsen. This motion is made on the grounds that the above property was illegally seized for the following reasons:

1. The warrant was insufficient on its face;

2. There was no probable cause for believing the existence of the grounds on which the warrant was issued;

3. The warrant was not obtained in conformity with the requirements of 808.3 of Supplement to the Code of Iowa, 1977, in that the affidavit and sworn testimony in support of said application as shown in the information for search warrant which furnished the basis for the issuance for said warrant, does not set

forth sufficient grounds for granting the application and probable cause for believing that such grounds exist.

4. That the search warrant was issued without a sufficient showing of probable cause, violating the provisions of the 4th and 14th Amendment to the Constitution of the United States and Article 1, § 8 of the Constitution of the State of Iowa.

DIVISION II.

The Defendant, Carl Eric Olsen, by his attorneys, Raymond Rosenberg and Gregory Johnston, hereby moves the Court, pursuant to Rule 11 of the Iowa Rules of Criminal Procedure for an Order suppressing as evidence, all property seized on May 21, 1978, by police officers of the City of Muscatine, Iowa, and West Liberty, Iowa, and/or officers of the Sheriff's office of Muscatine, Iowa, on May 21, 1978, from the Defendant's motor vehicle and from the Defendant, to-wit:

(A) $10,915.00 in United States currency;

(B) 10 pieces of various containers, containing leafy material;

(C) 1 Brown Samsonite Brief Case, containing 2 packages of leafy material;

(D) 2 Small notebooks containing written material, as a result of the execution of a search warrant, dated the 21st day of May, 1978, which said warrant directed police officers to search a vehicle owned, controlled or in the possession of Carl Eric Olsen. This motion is made on the grounds that the above property is inadmissible evidence and should be suppressed for the following reasons:

(1) That on May 21, 1978, a search warrant was issued by the above-entitled court and executed by police officers on the same date upon a car belonging to the Defendant;

(2) The property sought to be suppressed was seized from Defendant's car as a result of the execution of said warrant;

(3) The provisions of § 808.5 of the Supplement to the Code of Iowa, 1977, requires that when a warrant is executed, it shall be forthwith returned to the issuing Magistrate;

(4) The aforesaid warrant, while executed on the 21st day of May, 1978, was not returned to the issuing magistrate until the 28th day of August, 1978, which constitutes a substantial failure to comply with the provisions of said section.

(5) That paragraph 809.2 of the Supplement to the Code of Iowa, 1977, provides that a notice of hearing, containing a reasonable description of the property, the time, place and cause of its seizure be issued within 48 hours of the time of its seizure and that such notice be reasonably calculated to apprise

effected persons of the pendency of a hearing;

(6) That the notice required under § 809.2 did not issue until the 29th day of August, 1978, approximately 98 days thereafter;

(7) That the proceedings herein are illegal, unlawful and in violation of the provisions of § 808.5 and 809.2 of the Supplement to the Code of Iowa, 1977, and that any action brought herein is as a consequence thereof null and void;

(8) That the admission into evidence of the above property should be suppressed for failure to comply with the mandatory provisions with respect to both the return of the executed warrant and the giving of notice of seizure within 48 hours from the time of its seizure;

(9) That by failure to comply with the provisions with respect to notice, so as to reasonably apprise Defendant of

the pendency of the action within the period set out in the Statute, the search warrant herein should be declared as null and void for want of proper jurisdiction and compliance with the Statute.

(10) The property seized from the Defendant's vehicle should be suppressed as evidence against the Defendant at the time of his trial.

/s/ Raymond Rosenberg
Attorney for Defendant

AMENDMENT TO MOTION TO SUPPRESS
(Filed March 9, 1979)

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

| | | |
|---|---|---|
| STATE OF IOWA, | : | NO. 738-578 |
| Plaintiff, | : | |
| vs. | : | DEFENDANT'S FIRST AMENDMENT TO MOTION TO SUPPRESS |
| CARL ERIC OLSEN, | : | |
| Defendant. | : | |

The Defendant, by his Attorneys, Raymond Rosenberg and Gregory Johnston,

does hereby Amend the Motion to Suppress heretofore filed in this matter in the following particulars:

1. That paragraph 1 of Division I be amended to read as follows:

"1. That the warrant was insufficient on its face for the following reasons:

(A) That it failed to describe with particularity the place to be searched.

(B) That it failed to specify with particularity the property to be seized."

2. That paragraph 4 of Count I be amended to read as follows:

"4. That the search warrant was issued without probable cause for the following reasons:

(A) That the search warrant failed to describe with particularity the place to be searched.

(B) That it failed to describe with particularity the property to be seized,

thus violating the provisions of the Fourth and Fourteenth Amendments to the Constitution of the United States and Article I Section 8 of the Constitution of the State of Iowa."

3. That paragraph 5 be added to Division I as follows:

"5. That the property sought to be suppressed was seized pursuant to a warrant that violated the provisions of the Fourth and Fourteenth Amendments to the Constitution of the United States and Article I Section 8 of the Constitution of the State of Iowa for the following reasons:

(A) That the search warrant failed to describe with particularity the place to be searched.

(B) That it failed to describe with particularity the property to

be seized."

/s/ Raymond Rosenberg
Attorney for Defendant

RULING ON MOTION TO SUPPRESS
(Filed March 16, 1979)

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

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| | | |
|---|---|---|
| STATE OF IOWA, | : | |
| | | NO. 738-578 |
| Plaintiff, | : | |
| vs. | : | |
| CARL ERIC OLSEN, | : | |
| | | RULING |
| Defendant. | : | |

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Defendant has filed a motion to suppress as evidence all property seized on May 21, 1978 by law enforcement officers from the defendant's motor vehicle and from the defendant; namely, a substantial amount of United States currency, ten pieces of various containers containing leafy material, a brown Samsonite briefcase containing two packages of leafy material, and two small notebooks con-

taining written material.

One ground of the motion is that there was no probable cause for believing the existence of the grounds on which the warrant was issued. The Court has examined the warrant, has examined the application for warrant, has examined the magistrate's notes concerning additional testimony taken from another law enforcement officer, and has read the depositions of Officers Snyder, Wiegand, and Trudell. The Court is satisfied that there were substantial grounds to believe that a large amount of marijuana was located in the trunk of the defendant's motor vehicle. There would not have been probable cause to believe such to be the case if the only thing found by the officers had been the partially consumed cigarette containing marijuana and the tin of hashish or marijuana in the pocket of the defendant. The significant factor was the overriding

all-pervading odor of marijuana in and about the vehicle that could not be explained by these small items of such substance. The officers all commented on this and the experienced officers had ample reason to believe that there had to be substantial quantities of marijuana elsewhere in the vehicle, and the only place else in the vehicle would have been the trunk of the car. Moreover, the officers had reasonable grounds to believe that it was not just a minor amount of marijuana in the trunk of the car but had to be of some substantial weight because of the depressed condition of the rear of the car. The general demeanor of the defendant likewise contributed to reasonable cause to believe that there was substantial quantities of marijuana in the trunk.

The defendant also complains that the evidence should be suppressed because the warrant was insufficient on its face.

The reasons alleged are that the warrant failed to describe with particularity the place to be searched and that it failed to specify with particularity the property to be seized. These two grounds are also urged as an additional reason for claiming that the search warrant was issued without probable cause.

The Court has been unable to find a case exactly like this one. The affidavit applying for the search warrant was clear and specific in identifying the property to be seized and the vehicle to be searched. The testimony of the witnesses was also clear and precise and the minutes of the magistrate in reciting the information that he was given and the facts and circumstances concluded is very clear, and it is very clear that neither the officer who signed the application nor the officer who conducted the search and who also helped prepare the application

and who also testified in front of the magistrate nor the magistrate have any doubt as to the precise description of the vehicle to be searched nor precisely the subject matter to be seized pursuant to the authority of the warrant. The magistrate himself actually saw the vehicle as indicated in his minutes. The Court finds authority that where there is ambiguity or uncertainity in the warrant as to the property to be searched, that this is not fatal where the executing officer is the affiant. The Court also finds note that an executing officer may look to the affidavit to resolve an ambiguity in the warrant and that where there is no doubt and can be no mistake as to what is to be searched, the fact that this is not clear from the face of the warrant is not fatal. 68 Am. Jur. 2d Searches and Seizures, Section 74-77, pp. 728-732.

Although this is a difficult case,

and the magistrate is really to be heavily criticized for the sloppiness of his warrant, the Court is going to rely and does rely on the same reasoning. There is no question whatsoever what the magistrate intended be seized, what the officer desired to seize, and what the officers were permitted to seize. This is done by construing the application for the warrant, the minutes of the magistrate, together with the warrant itself. The Court feels this is particularly true in this case since the magistrate was present and actually viewed the vehicle in the custody of the police and where the officers who participated in the search and seizure also participated in the application and testimony before the magistrate. The execution of the warrant in this case was not done as a subterfuge, as a fishing expedition, or in any manner as a means of violating the provisions of the con-

stitution. The Court does not specifically pass upon the question of whether or not the items listed in the complaint were otherwise validly seized under the warrant. The Court rules only that the warrant was intended to and did authorize the seizure of any controlled substance or paraphernalia containing a controlled substance. The term controlled substance is a term of art and has meaning clearly identifiable under the provisions of Chapter 204 of the 1977 Code of Iowa. Whether or not the items listed in the initial inventory were properly seized under the provisions of the law where a valid search warrant is being executed is a matter which was not argued or advanced at this time.

The defendant further asks to have the evidence suppressed by the reason of what it claims to be a failure to comply with the law in making a return on the execution of the warrant. It is well

established by the law of this state and others that this is a ministerial matter and will not affect the use of the seized property and evidence, unless the defendant chose prejudice, and the defendant has shown none. It is stated that this is not the usual case. I will assume without deciding that possessing 129 pounds of marijuana is not the usual case. However, the record shows that the defendant was contemporaneously informed by the arresting officers of their find and his arrest on the charge of possession of a controlled substance with intent to deliver, he was given a copy of the search warrant, he was given a copy of the articles found in the trunk of the automobile, although he refused to acknowledge the same, and he was given the right to and did contact legal counsel almost immediately after his arrest.

FOR THE REASONS ABOVE STATED, the

motion to suppress is overruled in its entirety.

/s/ MARGARET S. BRILES,
JUDGE

THE SUPREME COURT OF IOWA

NO. 63567

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STATE OF IOWA

PLAINTIFF-APPELLEE,

vs.

CARL ERIC OLSEN

DEFENDANT-APPELLANT.

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APPEAL FROM THE DISTRICT COURT

OD MUSCATINE COUNTY

HONORABLE R. K. STOHR, JUDGE

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Filed: June 18, 1980

Considered by REYNOLDSON, C.J. and REES, HARRIS, McCORMICK, and ALLBEE, JJ.

McCORMICK, Justice.

Defendant Carl Eric Olsen appeals

his conviction by jury and sentence for possession of a controlled substance with intent to deliver in violation of § 204.401(1), The Code 1977. He contends the trial court erred in overruling his motion to suppress evidence obtained in a search of his automobile and in overruling his objection to testimony of a D.C.I. agent which went beyond the scope of the minute of his testimony attached to the trial information. We uphold the ruling on the search issue but reverse and remand on the issue of the D.C.I. agent's testimony.

(1) I. The search issue. Defendant moved to suppress evidence seized as a result of a search of his automobile, alleging that the search violated U.S. Const. Amend. IV and Iowa Const. art. I, § 8. Among other grounds, he contended the search was unlawful because made pursuant to a warrant which was invalid

because it did not describe with particularity the place to be searched and the property to be seized. Judge Margaret Briles overruled the motion, and defendant contends the ruling was wrong because of the inadequacy of the description. In resisting reversal, the State alleges the warrant was valid, but, even if it was not, the search was nevertheless lawful because because of the existence of probable cause and exigent circumstances. Because a constitutional challenge is involved, we find the facts de novo. State v. Aschenbrenner, 289 N.W.2d 618, 619 (Iowa 1980).

While driving his 1977 Dodge automobile near West Liberty at approximately 10:45 p.m. on May 20, 1978, defendant passed two other vehicles in a no-passing zone. The incident was observed by deputy sheriff Lowell Snyder, who pursued defendant and stopped his automobile in West

Liberty. Two West Liberty police officers came to the scene of the stop shortly afterward. Snyder was somewhat suspicious of defendant because he was driving a car with out-of-county plates, seemed to be unfamiliar with the road, and appeared to be in a hurry. As a result, he ordered a vehicle check which confirmed Defendant's ownership of the automobile. While issuing him a citation for the traffic violation, Snyder smelled marijuana on defendant's clothing. He and the other officers also smelled a strong marijuana odor coming from the interior of the vehicle. One officer observed and removed a marijuana cigarette, which he called "a large roach", from the front ashtray. A small cardboard box containing marijuana seed was removed from the front seat. The officers, who were experienced in drug investigations, believed the odor of marijuana was stronger than could be

accounted for by the cigarette. They noticed the rear of the vehicle appeared to be weighted down.

Defendant was placed under arrest for possession of marijuana. A search of his clothing turned up a small "rock-hard" quantity of hashish in a shirt pocket and twelve to fourteen dollars in quarters in his trouser pockets. He admitted to a prior arrest for possession of marijuana. The officers searched the interior of the vehicle without finding any additional drugs. They then asked defendant for permission to search the trunk. He became quite nervous and refused, telling the officers he had people waiting for him and was in a hurry. He asked them to leave his vehicle alone.

The officers suspected defendant might be carrying additional marijuana in the trunk of the car. For that reason they decided to take the vehicle to the

West Liberty police station to be held while they sought a search warrant. The vehicle was towed to the station and guarded until a warrant was obtained.

Depute Snyder obtained and executed the search warrant. He found 129 pounds of marijuana in the trunk of the vehicle, most of which was contained in bales wrapped in brown paper. Another officer discovered a white paper bag behind the spare tire which contained $10,915. in currency. Additional marijuana was found in a briefcase, and other items were also seized.

We will assume, without deciding that the warrant was invalid in form as asserted by defendant because we believe it is clear the State is right that the search was lawful even without the warrant.

(2) While a warrant is preferred, the fourth amendment "does not require a search warrant . . . when the police stop an automobile on the street of highway

because they have probable cause to belive it contains contraband or evidence of a crime." Arkansas v. Sanders, 442 U.S. 753, 760, 99 S.Ct. 2586, 61 L.Ed.2d 235, 242 (1979). While the "automobile exception" does not invariably authorize warrantless vehicle searches, the Supreme Court has recognized two reasons for treating the warrant requirement differently for automobiles than for other private property. One is the "inherent mobility" of automobiles, and the other is the diluted "reasonable expectation of privacy" resulting from their "configuration, use, and regulation." Id. at 761, 99 S.Ct. at 2591, 61 L.Ed 2d at 243.

The Carroll-Chambers doctrine has evolved in automobile search cases. In Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Supreme Court held that a search warrant is unnecessary for search of an automobile

when probable cause and exigent circumstances exist. Furthermore, the exigent circumstances requirement is satisfied "when the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." Chambers v. Maroney, 399 U.S. 42, 51, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419, 428 (1970).

In Chambers the Court carried Carroll one major step further. The question in Chambers was the admissibility of evidence seized from an automobile after the automobile was taken from the scene of the accused's arrest to a police station and there thoroughly searched without a warrant. The Court held that if a warrantless search of the automobile at the scene would have been reasonable, the automobile could be seized and taken to the station house for the later warrantless search. The Court said: "For con-

stitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." Id. at 52, 90 S.Ct. at 1981, 26 L.Ed2d at 428.

We applied the Carroll-Chambers doctrine in upholding a warrantless search of an automobile at the scene of arrest in State v. King, 191 N.W.2d 650, 657 (Iowa 1971), cert. denied, 406 U.S. 908, 92 S. Ct. 1617, 31 L.Ed.2d 819 (1972) ("Under Chambers it was just as reasonable to search the car without a warrant as it would be to seize it and hold it until a warrant could be obtained").

However, in State v. Schlenker, 234 N.W.2d 142, 145 (Iowa 1975), we refused to find exigent circumstances authorizing

a warrantless search upon probable cause when an automobile had been immobilized long enough for officers to obtain a warrant which turned out to be invalid. We said: "The obtaining of the invalid warrant belies and negatives any rational claim of exigent circumstances." Id. At that time some doubt existed as to the scope of Chambers.

In Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), and Dyke vs. Taylor Implement Manufacturing Co., 391 U.S. 216, 88 S.Ct. 1472, 20 L.Ed.2d 538 (1968), the Supreme Court had invalidated station house searches of automobiles seized during arrests. Those cases were distinguished but not overruled in Chambers. Moreover, the Chambers opinion included a footnote specifically finding the decision of the officers in that case to search the car at the police station rather than at the

scene was "not unreasonable" in the circumstances. 399 U.S. at 52 n.10, 90 S.Ct. at 1981, 26 L.Ed2d at 429. It was not certain that Chambers was intended to give officers an automatic right to search a vehicle upon probable cause without a warrant after immobilizing it long enough to obtain a warrant upon a mere showing that probable cause and exigent circumstances would have permitted a warrantless search at the time it was stopped.

This issue was settled by the Supreme Court in Texas v. White, 423 U.S. 67, 96 S.Ct. 304, 46 L.Ed.2d 209 (1975) (per curiam), decided after our decision in Schlenker. In White the Court held that so long as the probable cause for a search at the scene of the stop still obtained at the station house, a warrantless search at the station house was permissible. It is not clear that the absence of exigent circumstances for the later search is wholly

irrelevant. Exigent circumstances are necessary only initially. In White the Court characterized its holding in Chambers by saying: "In Chambers v. Maroney we held that police officers with probable cause to search an automobile at the scene where it was stopped could constitutionally do so later at the station house without first obtaining a warrant." Id. at 68, 96 S.Ct. at 305, 46 L.Ed.2d at 211.

(3) It is thus established as a matter of federal constitutional law that if the search in the present case could have been made at the scene of the stop without a warrant, the automobile could still be searched after it was moved to the police station, provided only that probable cause still existed. We are not free to give a more restrictive interpretation to the Federal Constitution than that of the United States Supreme Court. Oregon v. Hass, 420 U.S. 714, 719, 95 S.Ct. 1215,

1219, 43 L.Ed.2d 570, 576 (1975).

However, we are still free to apply our Schlenker holding as a matter of state law if we should exercise our perogative to interpret the Iowa Constitution more restrictively than the Supreme Court has interpreted the comparable language in the Federal Constitution. See Bierkamp vs. Rogers, _____ N.W.2d _____, _____ (Iowa 1980) ("The result reached by the United States Supreme Court in construing the federal constitution is persuasive, but not binding upon this court in construing analogous provisions in our state constitution."). We have an interest in harmonizing our constitutional decisions with those of the Supreme Court when reasonably possible, even though we recognize and will jealously guard our right and duty to differ in appropriate cases. In this case we are persuaded that the state constitution should be given the same

interpretation as the Federal.

We conclude that we will apply the Carroll-Chambers doctrine under Iowa Const. art. I, § 8, rather than the holding in Schlenker.